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December 22, 1998

VIA HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

In re: Carriage of the Transmissions of Digital Television Broadcast Stations
(CS Docket No. 98-120)

Dear Ms. Salas

On behalf of Golden Orange Broadcasting Co., Inc., licensee of television station KDOC-TV, Anaheim, California, there are herewith transmitted an original and five copies of its "Reply Comments of Golden Orange Broadcasting Co., Inc." in the above-referenced digital must-carry proceeding

It is respectfully requested that the enclosed document be associated with the licensee's appropriate Commission file.

Yours very truly

Robert B. Jacobi

RBJ:btc

Enclosures

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BEFORE THE

Federal Communications Commission

In the Matter of	)	
	)	
Carriage of the Transmissions of Digital Television Broadcast Stations	)	CS Docket No. 98-120
	)	
	)	
Amendments to Part 76 of the Commission's Rules	)	
	)	

REPLY COMMENTS OF GOLDEN ORANGE BROADCASTING CO., INC.

Golden Orange Broadcasting Co., Inc., the licensee of TV Broadcast Station KDOC-TV, Anaheim, CA ("Golden Orange" or "KDOC"), respectfully files these Reply Comments to the Comments of those who have disagreed with the contention of Golden Orange (Comments, pp. 3-6) that Section 325(b)(4) and (5) of the Communications Act of 1934, as amended by the Cable Television Consumer Protection Act of 1992 ("Cable Act"), mandates that stations which exercise their retransmission consent rights may not be counted in determining whether a cable system has fulfilled its obligations under Section 614(b)(1)(B) of the Cable Act, until after qualified stations exercise their must-carry rights. Reference to the legislative history (specifically, the Senate Report) cannot be relied on to circumvent the requirement of Section 325, because 1) the Senate Report substantively differed from the final Conference Report and 2) the language of the statute itself is clear and unequivocal. In support of its position, Golden Orange states:

1. During the transition to digital television, in which each existing "local" station will have two, rather than one, operating channels, it becomes immediately apparent that which stations are considered "local" for the purposes of Section 614 of the Communications Act and Section 76.56(b) of the Commission's Rules becomes a critical

question, both for stations and cable systems. The question considered in the KDOC Reply Comments is whether, in complying with the requirements of Section 614, "local" stations which have, but do not exercise, their must-carry rights, and choose to rely on retransmission consent, are entitled to the same rights as those stations which do exercise their must-carry rights. Golden Orange respectfully urges that stations which opt for the advantages gained by retransmission consent, by the same token must surrender the right to mandatory carriage, at least to the extent that such carriage would interfere with or supersede those local stations which forego the advantages of retransmission consent carriage in order to insure carriage on a must-carry basis. **Congress has clearly so ordered.**

2. The key statutory provision is Section 325(b) of the Communications Act, enacted at the same time as Section 614. Its language unequivocally requires that if an originating station elects retransmission consent the provisions of Section 614 shall not apply to the carriage of its signal by a cable system (§ 325(b)(4)), and that the exercise of its right to grant retransmission consent "shall not interfere with or supersede the rights under section 614 or 615 of any station" which asserts the *right* to signal carriage under those sections (§ 325(b)(5)). There are no limitations or restrictions in Section 325 (b). It does not in terms or by implication apply only to some of the rights of carriage of the station which exercises its must-carry rights; it is not limited to channel position, or to carriage of the entire signal. It can be read only as protecting the right of the must-carry elected station to be carried , and particularly, since it refers directly to Sections 614 and 615, to the cable system's compliance with the choice of the signals which it must carry in order to comply with the numerical requirements of Section 614.

3. Although, as will be shown below, the legislative history of the Cable Act is not in any way inconsistent with this conclusion, that legislative history is irrelevant. If statutory language is clear and unequivocal, it must be applied as written; its meaning

cannot be altered by reference to its legislative history. The Supreme Court held in *West Virginia Hospitals, Inc. v. Casey,* 499 U. S. 83, 113 L. Ed. 68, 111-A S. Ct.1138 (1991), that (at 111-A. S. Ct.1147):

> As we have observed before, however, the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. * * * [T]he best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous--that has a clearly accepted meaning in both legislative and judicial practice--we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.

The Court cited a 1917 decision which stated (*Id.*) that where the statute's language is plain, the sole function of the court is to enforce it according to its terms. In *United States v. Turkette,* 452 U.S. 576, 69 L. Ed. 246, 101-A S. Ct. 2524 (1981), the Court held (at 101-A S. Ct. at 2527):

> In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive."[Citing an earlier case.]

It is the purpose of Golden Orange not only to establish that the language of Section 325(b)(5) is unambiguous, but that there is no clearly expressed legislative intent contrary to the clear requirement of that statute that stations which exercise their must-carry rights must be carried in preference to those relying on retransmission consent in a cable system's reaching compliance with the requirements for the carriage of local stations.

4. The meaning of Section 325(b)(5) of the Act is clear and unambiguous on its face. However, there is one sentence in the Senate Report which, if it stood alone, might raise some question about its meaning as applied to a cable system's obligations to

carry local signals.[1/] In discussing the Bill's direction for the Commission to conduct a rulemaking proceeding and within a more complete context, the Senate Report stated (at pages 37-38) as follows:

> "Section 325 makes clear that a station electing to exercise retransmission consent with respect to a particular cable system will thereby give up its rights to signal carriage and channel positioning established under sections 614 and 615 for the duration of the 3-year period . . . . Concomitantly, the FCC's rules should provide that carriage of a station exercising its right of retransmission consent will count towards the number of local broadcast signals that a cable system is required to carry under sections 614 and 615."

The ambiguity expressed in the Senate Report is not found in the Conference Report. The Conference Report (H. Rep. 862, 102nd Congress, 2nd Sess., 1992), however, not only omitted the last referenced sentence but, to the contrary, emphasized the sanctity of carriage under sections 614 and 615 by specifically referencing the broadcasters' carriage expectation and stating (at page 94): "The conference agreement provides that the rights granted to stations under sections 614 and 615 will not be affected by the exercise of the right of retransmission consent by another station."[2/]

5. The Conference Report (which reflects consideration of the Senate Report) was based upon the conferees resolution of the ambiguous language set forth in the

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1/ The sentence appears in the Senate Report on S.12 (Senate Report, 102nd Congress, 1st Sess. (1991)) at pages 37-38: "Concomitantly, the FCC's rules should provide that carriage of a station exercising its right of retransmission consent will count towards the number of local broadcast signals that a cable system is required to carry under sections 614 and 615."

2/ The Conference Report elaborated:" The conferees believe that a broadcaster that elects to exercise its rights to carriage and channel positioning under sections 614 does so with the expectation that it will in fact be carried by the cable system. In the event that the cable system elects not to carry such a signal in fulfillment of its obligations under sections 614, * * * the conferees intend that the broadcaster be permitted to reassert its right to require consent before carriage by the cable system under other conditions." *Id.* (Emphasis added.)

Senate Report.[3/] The most plausible explanation for the omission of the noted sentence in the Conference Report was the conferees' preference for the clear statutory language.[4/] The statutory language is clear and unambiguous; there is no "clearly expressed legislative intent to the contrary"; case precedent mandates that statutory language must be applied in accordance with its plain meaning.[5/]

6. Nothing in the Commission's rulings on must-carry and retransmission consent is inconsistent with the position urged herein by Golden Orange. Golden Orange has been unable to find any recorded Commission decision in which a choice had to be made between a station which asserted its must-carry rights and a station with must-carry rights, but which chose to rely on retransmission consent, in applying Section 614. The only evidence of the Commission's understanding of and attitude toward Section 325(b)(5) appears in the rule making decisions in the proceeding to comply with the Cable Act, *Must Carry and Retransmission Consent Requirements, R and O,* 8 FCC Rcd. 2965, 72 RR.2d 204 (1993); *M O & O on reconsid. 9* FCC Rcd. 6723, 76 RR.2d 627 (1994) ("Must Carry Proceeding").

7. In implementing the provisions of Section 614 of the Cable Act, the Commission dealt with "local" stations, but did not address expressly or by implication the

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3/ The conferees not only omitted the aforesaid sentence from the Conference agreement set forth in the Conference Report, the conferees also omitted such sentence in characterizing the nature of the aforesaid Senate provision (at pages 93-94).

4/ The sentence in the Senate Report also could be understood to mean that a retransmission consent station would count as a local station for purposes of Section 614 only after the system had complied with the rights of the stations which exercised their must-carry rights.

5/ Section 325(b)(5) states that the exercise of the right of the television station to grant retransmission consent shall not interfere with or supersede rights of any station electing must-carry; Section 325(b)(5) does not say that the exercise of retransmission consent shall not interfere with or supersede the rights of the must-carry stations, except for the right to carriage itself.

requirements of Section 325(b)(5) as they apply to the right to carriage on a cable system. Indeed, in a later section of the Report and Order, it made abundantly clear that it was not deciding that matter (R and O, ¶ 171, fn.432, 72 RR.2d at 250):

> In our Notice at 8068, we asked for comment on how to codify the Section 325(b)(5) provision that retransmission consent stations shall not interfere with or supersede the Section 614 or 615 rights of stations electing must-carry status. We noted that the Conference Report indicates that this provision applies, *inter alia*, to channel positioning negotiations. We received no specific guidance in comments on how to codify this provision. Hence, we shall adopt the statutory language along with the specific example from the Conference Report.

That statement makes it clear that the Commission was aware that the requirements of Section 325(b)(5) go beyond channel positioning, but that it would adopt the example on that subject from the Conference Report, and otherwise merely repeat the language of the statute without defining its requirements further. It surely indicated thereby that other aspects of that statute were yet to be decided. In other words, the Commission chose to postpone such questions as which "local" station -- must-carry or retransmission consent -- would have prior rights in a cable system's complying with Section 614. That question must now be faced.[6/]

8. Although in its M O & O on Reconsideration the Commission again visited the relationship between the rights of must-carry stations which exercise those rights and those stations eligible for must-carry which elect retransmission consent (¶¶ 103-106, 76 RR.2d at 655-656), it did so only with respect to whether the station's signal must be carried in its entirety. Nothing in its discussion dealt with the right to carriage. The conclusion is inevitable that the Commission has never addressed the question to which these

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6/ As part of the same discussion (R and O, ¶ 169) the Commission pointed out that, "Section 325(b)(4) states that if a television station elects to exercise retransmission consent rights, then 'the provisions of section 614 shall not apply to the carriage of the signal of such station by such cable system.'"

Reply Comments are addressed, although it has been aware of that question. In considering the adoption of DTV must-carry rules, the Commission should apply the clear intent of Section 325(b) -- the effect of which will ensure expanded cable carriage of independent television stations. Surely, there is no administrative practice which is counter to the statutory interpretation urged by Golden Orange.

9. Pragmatically, KDOC understands that mandatory carriage of DTV signals together with the mandatory carriage of analog signals (at the outset) is likely to result in the adoption of rules which will provide some level of flexibility, i.e., phased-in carriage requirements. In adopting rules, however, the Commission must consider the status of non-network independent stations. Network stations will be carried by multi-video distributors with or without must-carry. Time Warner and CBS have recently entered into a digital carriage agreement. Similar agreements involving other networks and other multi-video distributors reasonably can be anticipated. Satellite television distributors are seeking a waiver of the existing analog must-carry rules which would relieve such carriers from the mandate of the must-carry rules and would allow the delivery by satellite carriers of only local network signals.

10. Independent stations need mandatory must-carry to ensure carriage. Independent stations generally lack the leverage that networks command. The same reasons underlying Congressional enactment of analog mandatory must-carry rules and the rationale of the Supreme Court in affirming those rules are no less compelling with respect to the carriage of the digital signals. Without DTV mandatory must-carry, the analog experience of KDOC (having been dropped by 16 cable systems following Quincy, see Golden Orange Comments, ¶ 4) will be repeated by numerous independent stations.

11. The analog signal of KDOC (as well as other independent television stations) now are not being carried by some cable systems on the basis that such cable

cable systems have complied with the required complement of must-carry stations. In order to avoid further exacerbation of an existing inequitable problem, the Commission should adopt DTV rules (and especially as to phased-in carriage rules) which 1) require that cable systems carry either the analog or DTV signal (at the licensee's choice) of all eligible stations requesting carriage under Sections 614 or 615 prior to the carriage of DTV signals and 2) not count as a part of the cable systems' mandatory must-carry complement stations which are carried pursuant to retransmission consent.

Respectfully submitted,

GOLDEN ORANGE BROADCASTING CO., INC.

By: Calvin C. Brack

Calvin C. Brack
Chief Executive Officer

Date: December 22, 1998